



June 5, 2019

**Via ECFS**

Marlene H. Dortch  
Secretary, Federal Communications Commission  
445 12<sup>th</sup> Street SW  
Washington, D.C. 20554

Re: *Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. §160(c) to Accelerate Investment in Broadband and Next-Generation Networks*  
(WC Docket No. 18-141)

Dear Ms. Dortch:

On June 3, 2019, the undersigned, along with Joan Marsh, AT&T; Clay Bailey, CenturyLink; Ken Mason, Frontier; Kathleen Grillo, Verizon; and Jonathan Spalter, President & CEO of USTelecom – The Broadband Association (“USTelecom Representatives”) met with Chairman Pai and Nirali Patel, Wireline Legal Advisor to the Chairman, in support of USTelecom’s Petition for Forbearance (“Petition”).<sup>1</sup> During the meeting, the USTelecom Representatives explained that: (1) the highly competitive modern communications marketplace and the negative impact on consumers and competition of maintaining an outdated regulatory regime justifies granting the Petition; (2) no consumer or business will lose access to voice or broadband if relief is provided; and (3) contrary to the hyperbole of Petition opponents, this is primarily an urban, business issue and not a rural or residential broadband issue. Today, USTelecom members face substantial competition from other facilities-based broadband providers (primarily cable companies who do not rely on UNEs) especially in urban areas where nearly all unbundled network elements (“UNE’s”) are used.

The USTelecom Representatives stated that, at a minimum, there is no legally justifiable reason to require the continued provisioning of UNEs and incumbent local exchange carrier (“ILEC”)-specific resale mandates in areas where there is voice and broadband service competition. Given extensive retail voice competition, there is no basis for continued unbundling of analog loops or resale, which are used by competitive local exchange carrier (“CLECs”) almost exclusively to provision voice services. And, in the areas where cable operators are providing robust broadband in competition with the ILEC, there is no basis for requiring the unbundling of DS1 or DS3 loops, or of digital DS0 loops because retail customers have options for obtaining high-capacity services from at least two providers relying on distinct networks.

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<sup>1</sup> See Petition for Forbearance of USTelecom – The Broadband Association, WC Docket No. 18-141 (filed May 4, 2018) (“Petition”).

Finally, the USTelecom Representatives explained that if the Commission were to grant partial relief along the lines described above, doing so would be wholly within the scope of the Commission's legal authority and would not in any way conflict with the framework governing forbearance requests.<sup>2</sup>

**1. The highly competitive modern communications marketplace justifies granting relief.** 23 years after its passage, the competition goals of the 1996 Telecommunications Act ("1996 Act") have unquestionably been achieved for voice and broadband service. Far from being dominant players, ILECs are now underdogs as they seek to provide consumers with competitive alternatives to cable or wireless service. Yet, the Commission still requires ILECs to open up their networks to competitors via UNE requirements at below market rates as if their position in the marketplace remains unaltered. Continuing to do so harms competition and investment and clearly does not make sense in areas where clear competitive alternatives to ILECs have emerged.

The USTelecom Representatives noted that granting regulatory relief from outdated and burdensome requirements aligns with the Commission's goal of modernizing outdated regulations to accelerate the transition to modern networks. As Chairman Pai previously stated, "the FCC has had much experience with unbundled network elements (UNE) ... [and] [t]he UNE rabbit hole shows how forcing carriers to offer their networks at regulated rates can wreak havoc. ... The lesson is clear: The government can't manufacture competition through unbundling."<sup>3</sup> Supportive of that perspective, a core prong of Chairman Pai's 5G Fast Plan is "modernizing outdated regulations," including "mak[ing] it easier for companies to invest in next-generation networks and services instead of the fading networks of the past" and "lifting rate regulation where appropriate."<sup>4</sup> Granting the Petition is directly supportive of the 5G Fast Plan, in line with Commission actions to advance the transition to modern networks, and consistent with the deregulatory focus of Section 10 of the 1996 Act.

Indeed, the facts in this proceeding are precisely why Congress included the Section 10 forbearance provision in the 1996 Act and why a grant of relief is consistent with the public interest.<sup>5</sup> As the statute demands, "[i]n determining whether forbearance is consistent with the public interest, the [Commission] also must consider 'whether forbearance ... *will promote competitive market conditions*.'"<sup>6</sup> Where a given market is "subject to a significant amount of competition" and where "other regulatory safeguards" exist to the point that enforcement of a

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<sup>2</sup> See Letter from Patrick Halley, Senior Vice President, USTelecom, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 18-141 at Section II (filed May 6, 2019) ("May 6 Ex Parte Letter").

<sup>3</sup> *Business Data Services in an Internet Protocol Environment*, Report and Order, 32 FCC Rcd 3644, ("BDS Order").

<sup>4</sup> The FCC's 5G FAST Plan, FCC, <https://docs.fcc.gov/public/attachments/DOC-354326A1.pdf>.

<sup>5</sup> 47 U.S.C. § 160 ("Section 10").

<sup>6</sup> *Petition of USTelecom for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of Certain Legacy Telecommunications Regulations et al.*, Memorandum Opinion and Order and Report and Order and Further Notice of Proposed Rulemaking and Second Further Notice of Proposed Rulemaking, 28 FCC Rcd 7627, 7632 ¶ 7 (2013) (citing 47 U.S.C. § 160(b)).

given statute is “no longer necessary for the protection of consumers or to ensure [that parties do] not engage in unjust or unreasonable practices,” forbearance is “consistent with the public interest,” especially where forbearance “will increase the regulatory parity in the market.”<sup>7</sup> As the Commission has repeatedly found, “disparate treatment of carriers providing the same or similar services is not in the public interest as it creates distortions in the marketplace that may harm consumers.”<sup>8</sup> Hence, the public interest standard must be understood to encompass a variety of relevant factors, and must account for the numerous benefits that forbearance would generate for consumers in cases such as the instant proceeding, particularly when balanced with the clear statements in the record that no consumer will lose access to voice or broadband as described below.

**2. No consumer or business will lose access to voice or broadband service if relief is granted.** Consumers will not lose access to voice or broadband service if the Commission grants forbearance from network unbundling and resale requirements. First, USTelecom members have committed to making available commercial replacement or alternative services or arrangements for those locations that are presently served via UNEs.<sup>9</sup> Removing a UNE does

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<sup>7</sup> *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area et al.*, Memorandum Opinion and Order, 20 FCC Rcd 19415, 19453-56 ¶¶ 75-76, 78-83 (2005) (“*Qwest Omaha Order*”).

<sup>8</sup> *Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services*, Memorandum Opinion and Order, 22 FCC Rcd 18705, 18738 ¶ 68 (2007); *Petition of the Embarq Local Operating Companies for Forbearance Under 47 U.S.C. § 160(c) from Application of Computer Inquiry and Certain Title II Common-Carriage Requirements et al.*, Memorandum Opinion and Order, 22 FCC Rcd 19478, 19508 ¶ 60 (2007) (same); *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended (47 U.S.C. § 160(c)) et al.*, 22 FCC Rcd 16304, 16360 ¶ 129 (2007) (same).

<sup>9</sup> See, e.g., Letter from James P. Young, Counsel for AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 18-141, at 1-2 (filed Feb. 21, 2019); Reply Comments of Verizon, WC Docket No. 18-141, at 5 (filed May 28, 2019) (*Verizon Reply Comments*) (“Verizon and others have already committed to working with CLECs on their transition and to offering replacement or alternative services. For example, Verizon currently offers, and does not have plans to discontinue, alternatives to DS0 services such as Wholesale Advantage, Ethernet, and low-cost Ethernet.”); Reply Comments of AT&T, WC Docket No. 18-141, at 5 (filed May 28, 2019) (*AT&T Reply Comments*) (“ILECs will continue to offer DS1 and DS3 loop and transport services throughout their footprints at commercial rates (in counties where the Commission has found there to be sufficient competitive alternatives) or at regulated price cap rates (where the Commission has found competitive alternatives are not yet sufficiently available). ILECs will also continue to provide commercial UNE replacement services (a DS0 substitute) throughout their footprints, and ILECs have committed to offering standalone DS0 loops at commercial rates throughout their footprints.”); Reply Comments of Frontier, WC Docket No. 18-141, at 8 (filed May 28, 2019) (*Frontier Reply Comments*) (“Frontier here confirms that it already offers a voice grade DS0 special access service throughout its footprint, which is a substitute for analog DS0s and represents a DS0 freely available at a commercial rate. Further, Frontier currently offers a commercial UNE-P plan throughout its footprint. Frontier also offers resale of its broadband services to wholesale carriers nationwide. And while today Frontier does not offer a digital DS0 UNE substitute, Frontier commits to continue offering a commercial digital DS0 substitute product if the Commission believes it is a necessary condition of granting relief.”); Reply Comments of CenturyLink, WC Docket No. 18-141, at 2-3 (filed May 28, 2019) (*CenturyLink Reply Comments*) (“CenturyLink has long provided, and continues to provide, commercial replacement services for UNEs it is no longer required to provide. . . . CenturyLink commits to provide each UNE, including DS0 loops, on a commercial basis if the Commission forbears from the requirement to provide that UNE on a TELRIC basis pursuant to Section 251(c)(3), to the extent the copper facilities and other components necessary to provide that UNE remain in service.”).

not mean removing a facility; it means only that the pricing for that facility will reflect market realities and not an artificial regulatory construct. Second, the transition will not be abrupt: USTelecom has already committed to keeping existing UNEs in place until February 4, 2021 – nearly three years after filing the petition. Third, to address any concerns about service in rural areas that lack multiple competitors, USTelecom’s May 6 *Ex Parte* Letter noted the Commission’s ability to order partial relief at this time limited to areas subject to facilities-based competition (in competitive BDS counties or in areas with voice and broadband at a minimum of 25/3 Mbps).<sup>10</sup> In other words, the only areas where a UNE would not be available would be in areas already served by a facilities-based competitor that was able to deploy data, voice or robust broadband service.

**3. Contrary to the hyperbole of Petition opponents, this is primarily an urban, business issue, not a rural or residential broadband issue.** The record demonstrates that UNEs are concentrated in urban areas where there are already multiple competitors<sup>11</sup> and are used almost exclusively for business customers.<sup>12</sup> For example, a recent filing from a leading CLEC, TPx Communications, states that “the vast majority of TPx’s customers are business and government, not consumers.”<sup>13</sup> These CLEC admissions, as well as the data in the record, strongly rebuke INCOMPAS’ flawed suggestion that granting the Petition will harm rural consumers.<sup>14</sup> The data also confirm that the Commission is on solid ground to grant partial forbearance for UNEs in counties the Commission determined are competitive for BDS or in

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<sup>10</sup> May 6 *Ex Parte* Letter at 3, 8.

<sup>11</sup> Verizon Reply Comments at 3 (“the record shows that virtually all UNEs are purchased in urban areas where BDS demand is heavily concentrated and competition is robust, and that there is extremely low usage of UNEs in rural areas.”); Frontier Reply Comments (“Of the loops ordered in these states over this time period, zero were ordered in the most rural density zones, and less than 2% were ordered in the second most rural density zones (if there were more than two density zones). Of those 2% moderately rural customers, 80% had the option of another facility-based provider, generally a cable company, and all had the option to purchase voice and DSL service directly from Frontier.”); AT&T Reply Comments at 3 (“AT&T identified the service locations for the UNEs it sells to unaffiliated customers, and found that about 96% percent of those UNE locations are in census blocks that are also served by cable companies or a facilities-based fiber competitor. These findings are consistent across DS0 (96.8%), DS1 (94.4%), and DS3 (98.3%) UNEs.”); AT&T Reply Comments at 4 (“[C]ompetition for transport overall is also ubiquitous. Cable companies have deployed competing transport networks covering more than 90 percent of the population and households, both overall and separately for Tier 1, Tier 2, and Tier 3 wire centers.”).

<sup>12</sup> Verizon Reply Comments at 5 (“Verizon analyzed where it sells UNEs today, and confirmed that nearly all are sold at business locations”); CenturyLink Reply Comments at 2 (“Detailed analysis of CenturyLink’s UNE billing records reveals that few, if any, DS1 or DS3 loops provided by CenturyLink are used to serve residential customers, as are only a tiny percentage of DS0 loops.”); Frontier Reply Comments at 5 (“Frontier also analyzed how many of the DS0 analog and DS0 digital loops are used for residential purposes, and Frontier determined that well over 90% of analog and digital DS0s are used for businesses” . . . “in the four months’ period described above, only one-tenth of 1% of all loops ordered were for residences in moderately rural areas, and zero in very rural areas.”).

<sup>13</sup> Reply Comments of U.S. TelePacific Corp., Mpower Communications Corp., and Arrival Communications, Inc., WC Docket No. 18-141, at 11-12 (filed May 28, 2019).

<sup>14</sup> See e.g., Comments of INCOMPAS, WC Docket No. 18-141, at 6, 24 (filed May 9, 2019); Press Release, INCOMPAS, AT&T Places Their Own Interests over our Nation’s 5G Future (May 6, 2019), <https://www.incompas.org/content.asp?admin=Y&contentid=499> (issuing a statement from INCOMPAS CEO Chip Pickering suggesting that granting the Petition would “deprive millions of rural Americans out of their broadband access.”).

areas that are already served by a cable competitor given that the presence of UNEs are almost exclusively in the same locations.<sup>15</sup>

While INCOMPAS suggests that UNEs are necessary to build a “bridge to broadband,” for decades, it has been USTelecom members building that bridge and they will continue to do so. More recently, our cable competitors have demonstrated that bridges to broadband are possible without reliance on unbundling or wholesale resale mandates. Thus, for the reasons discussed above, the Commission should grant partial forbearance in areas subject to cable competition or in competitive BDS counties.

Please direct any questions to the undersigned.

Sincerely,

/s/ Patrick R. Halley

Patrick R. Halley  
Senior Vice President, Advocacy and  
Regulatory Affairs  
USTelecom – The Broadband Association

cc: Nirali Patel

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<sup>15</sup> Verizon Reply Comments at 4 (“Concerns about a limited number of specific rural or remote locations may warrant targeted consideration, but such anecdotes don’t substitute for reasoned data analysis or outweigh the masses of data about competition occurring elsewhere.”); AT&T Reply Comments at 8 (stating that Section 10 does not require a “painstaking analysis” of small geographic markets, and certainly not the isolated, location-specific situations that are the basis for INCOMPAS’s claims.”).